Nos. 95-345 and 95-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

—v.—

GUY JEROME URSERY,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI* TO
THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The government's aggressive use of federal civil forfeiture statutes to punish or deter conduct that is also the subject of parallel criminal proceedings threatens many constitutional values of great concern to the ACLU and its members. Multiplicitous proceedings punishing the same conduct are inherently offensive to double jeopardy principles. The government's ability to manipulate the order of parallel civil and criminal proceedings further adds to the anxiety, expense, and risk suffered by criminal defendants in many ways to be detailed below. The ACLU believes that the potential for prosecutorial overreaching cannot be curbed unless the Court declares that civil forfeiture and criminal proceedings concerning the same conduct may not be brought separately.

STATEMENT OF THE CASES

In No. 95-345, Michigan State police officers found 142 marijuana plants growing in a field adjacent to respondent Guy Ursery's property, and a small amount of marijuana paraphernalia inside his home. The United States began an *in rem* forfeiture proceeding on September 30, 1992, seeking to forfeit the Ursery family's residence pursuant to 21 U.S.C. §881(a)(7), on the theory that the residence had been used to facilitate a marijuana offense. On February 5, 1993, Ursery was charged in a one-count indictment with manufacture of marijuana in violation of 21 U.S.C. §841(a)(1).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

The civil forfeiture action was settled by consent judgment entered on May 24, 1993; Ursery was convicted by a jury on July 2, 1993, and sentenced, on January 19, 1994, to 63 months imprisonment and four years supervised release.

In No. 95-346, respondents Charles Arlt and James Wren were tried on an indictment handed down on June 12, 1991, charging them with manufacturing methamphetamine, money laundering, and conspiracy, pursuant to 21 U.S.C. §§841, 846 & 18 U.S.C. §§371, 1956; on June 17, 1991, the United States instituted a civil forfeiture action seeking to forfeit several bank accounts and various items of personal property, some on the theory that they were proceeds of illegal narcotics transactions under 21 U.S.C. §881(a)(6), and some on the theory that they were "involved in" money laundering violations under 18 U.S.C. §981(a)(1)(A). Arlt and Wren were convicted on March 27, 1992; on April 1, 1993, the district judge presiding over the forfeiture action granted the government's summary judgment motion. 33 F.3d at 1214.

Respondent Ursery's criminal conviction was reversed by the Sixth Circuit Court of Appeals on the ground that respondent had previously been put in jeopardy for the same offense by the forfeiture proceeding, 59 F.3d 568 (1995). The judgment forfeiting respondents Arlt and Wren's property was also reversed, by the Ninth Circuit Court of Appeals, on the ground that they too had been put twice in jeopardy. 33 F.3d 1210 (1994).

SUMMARY OF ARGUMENT

The separate civil forfeiture and criminal proceedings brought by the government in both cases below violated, for several interrelated reasons, the Double Jeopardy Clause's guarantee that no one shall be put twice in jeopardy for the same offense.

First, this Court's precedents compel the conclusion that the civil forfeitures at issue in these cases constitute punishment within the meaning of the Double Jeopardy Clause. Second, the Double Jeopardy Clause bars successive punishments regardless of whether the punishments are imposed in civil or criminal proceedings. Third, the successive punishments imposed in both cases below by civil forfeiture and criminal conviction are punishments for the same offense, as this Court has defined that term in its Double Jeopardy jurisprudence.

1. This Court has firmly rejected the formalistic view that legislatures may evade otherwise applicable constitutional restrictions on criminal or quasi-criminal proceedings simply by slapping a "civil" or "*in rem*" label on its creations. For example, in *Austin v. United States*, 509 U.S. __, 113 S.Ct. 2801 (1993), a unanimous Court ruled that civil forfeiture proceedings can be punitive and therefore subject to Eighth Amendment limitations. In *United States v. Halper*, 490 U.S. 435 (1989), the Court unanimously held that civil proceedings are punishment covered by the Double Jeopardy Clause when their purposes are not solely remedial. *See also Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. __, 114 S.Ct. 1937 (1994).

Together, *Halper* and *Austin* establish a two-step analysis in double jeopardy cases. Under *Austin*, the determination of whether a particular forfeiture is punitive is made, in the first instance, by looking at the statute involved. If the history and design of the forfeiture statute reveal an intent to punish, at least in part, the Double Jeopardy Clause applies. Under *Halper*, even a forfeiture statute that is solely remedial on its face can raise double jeopardy concerns if it is punitively applied in a particular case. Here, it is unnecessary to reach the second step of the analysis because the forfeiture statutes invoked by the government -- including 21 U.S.C. §881(a)(7), the same statute at issue in *Austin* -- are

indisputably punitive, at least in part.

2. The values of the Double Jeopardy Clause are implicated whenever punishment is imposed in two separate proceedings. Two different judges preside; there are two triers of fact; issues concerning the punitive forfeiture can linger for years after a criminal verdict. The risk that the government may wear down its targets increases, particularly in light of procedural weapons, like discovery and burden of proof, that give the government powerful advantages in civil forfeiture proceedings that would be wholly unavailable in a criminal prosecution.

The Court was therefore right in *Halper* when it concluded that the Double Jeopardy Clause can bar a civil proceeding. Indeed, this Court's forfeiture cases have consistently applied a variety of constitutional guarantees outside the Sixth Amendment (which is by its terms and structure reserved to criminal "prosecutions") to ensure that such proceedings do not punish unfairly. Excessive punishment, covered in *Austin*, is not the only relevant constraint. *See, e.g., One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965)(unanimously applying Fourth Amendment exclusionary rule to forfeiture proceedings); *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971)(privilege against self-incrimination, under appropriate circumstances); *Boyd v. United States*, 116 U.S. 616, 634 (1886)(same); *United States v. James Daniel Good Real Property*, 510 U.S. __, 114 S.Ct. 492 (1993)(due process notice and opportunity to be heard, absent exigent circumstances).

3. The parallel civil forfeiture and criminal proceedings in these cases did inflict double jeopardy for the same "offense" within the meaning of the Double Jeopardy Clause because the forfeiture statutes at issue subsume the underlying criminal offenses. Therefore, these multiple punish-

ments, although they would have been allowable in a single proceeding, may not be imposed in separate proceedings. To what extent the Due Process Clause would permit civil forfeiture and criminal proceedings to be joined, so that the government could enjoy the advantage of a lower burden of proof with respect to the penalty of forfeiture, is not an issue presented in this case.

ARGUMENT

I. THE CIVIL *IN REM* FORFEITURES IN THESE CASES CONSTITUTED PUNISHMENT THAT PLACED THE RESPONDENTS IN JEOPARDY WITHIN THE MEANING OF THE FIFTH AMENDMENT

The government's most fundamental objection to the decisions of the courts below is that the civil forfeitures in these cases do not constitute "punishment." Brief of the United States at 36-49. Consequently, the government claims, their imposition in cases in which the government also sought to punish the property owners criminally did not subject respondents to multiple, repetitive punishments or proceedings. The government's argument, however, is inconsistent with this Court's decisions in *United States v. Halper*, 490 U.S. 435, and *Austin v. United States*, 113 S.Ct. 2801. *See also Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937. *Halper*, *Austin*, and *Kurth Ranch* establish that Congress may not evade fundamental constitutional rules limiting punitive sanctions simply by applying a "civil" or "remedial" label to punishments for criminal conduct. This principle, essential to prevent the erosion of constitutional standards by an empty formalism, necessarily requires a more thoughtful and complex analysis of particular legislative regimes than a simplistic jurisprudence of labels. All forfeiture statutes, and even all forfeitures under the

same statutes, are not the same. But *Halper* and *Austin* establish the framework for analysis of civil forfeiture laws that should govern in these cases, protecting both the legitimate law enforcement interests underlying forfeiture statutes and the fundamental rights guaranteed by the Constitution.[2]

A. Under *Halper* And *Austin*, Forfeiture Provisions That Are Not Solely Remedial In Intent And Effect Impose Punishment For Purposes Of The Double Jeopardy Clause

In *Halper*, this Court unanimously recognized that a civil penalty may constitute punishment for purposes of the Double Jeopardy Clause. The Court expressly rejected any claim that the "civil" or "criminal" label attached to a proceeding or remedy is of great importance in determining whether a person subjected to it is placed in "jeopardy." 490 U.S. at 447-48. The core holding of *Halper* was that

[2] This Court's approach to the problem of forfeiture and double jeopardy has fluctuated over time. *Coffey v. United States*, 116 U.S. 436 (1886), held that an acquittal in a criminal case precluded a later civil *in rem* forfeiture action. In *United States v. 89 Firearms*, 465 U.S. 354 (1984), the Court overruled *Coffey*, assuming that the Double Jeopardy Clause is not applicable unless "the proceeding is essentially criminal in character," 465 U.S. at 362, and applying the factors set out in *United States v. Ward*, 448 U.S. 242 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), for determining when nominally civil proceedings are properly characterized as "criminal." *Halper* established current law by rejecting the *89 Firearms* approach, specifically declining to use the *Kennedy/Ward* test to define the coverage of the Double Jeopardy Clause. In *Austin*, 113 S.Ct. at 2806 n.6, the Court also rejected the *Kennedy/Ward* test as a definition of punishment for Eighth Amendment purposes. *See also Kurth Ranch*, 114 S.Ct. at 1944-48 (using the *Halper* methodology to determine what is punishment for purposes of the Double Jeopardy Clause).

the Double Jeopardy Clause prohibits separate civil and criminal penalties for the same offense "to the extent that the [civil] sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49.

Halper dealt with a liquidated damages provision fixing a specific, minimum recovery for the government in a civil action to recover for false claims made by a service provider. The basic legislative scheme in *Halper* was concededly remedial, closely resembling familiar liquidated damages provisions in private contracts. Nevertheless, the Court held that when the penalty set by the statute was grossly disproportionate to the actual damages suffered by the government, the penalty could no longer be considered purely remedial, even allowing for the "inevitabl[e] . . . rough justice" quality of liquidated damages provisions. *Id.* at 449. Though the statutory provision was intended to be remedial, under a case-by-case "rule . . . of reason," a court could determine, by an accounting of the government's actual "damages and costs" that, as applied to a particular situation the compensatory rationale had been exceeded, and the penalty "cross[ed] the line between remedy and punishment." *Id.* at 449-50.

Austin analyzed the distinction between the remedial and the punitive in the very different context of civil forfeitures resulting from narcotics crimes. Once again, the Court was unanimous, this time in holding that the Excessive Fines Clause of the Eighth Amendment applied to civil forfeitures under one of the very statutes at issue in this case, 21 U.S.C. §881(a)(7). As in *Halper*, the Court ruled that the issue was not whether a forfeiture served *some* remedial purpose. Rather, a forfeiture contained a punitive element, and was subject to the constitutional limitation on punishment, so long as its purposes and effects were not *entirely* remedial: "'[A] civil sanction that cannot fairly be said *solely* to serve a remedial function . . . is punishment." 113

S.Ct. at 2806, quoting *Halper*, 490 U.S. at 448 (emphasis added).[3]

The *Austin* Court pointed out that its precedents had "consistently recognized that forfeiture serves, at least in part, to punish the owner." 113 S.Ct. at 2810.[4] Moreover, and of critical importance, the Court analyzed the specific nature and purposes of the particular forfeiture provisions before the Court -- those provided in 21 U.S.C. §§881(a)(4) and (a)(7) -- and concluded that these particular forfeiture provisions bore specific indicia of serving the classically punitive purposes of retribution and deterrence.

First, the drug forfeiture provisions contain an innocent owner defense, thus "focus[ing] the provisions on the culpability of the owner." *Austin*, 113 S.Ct. at 2810-11. Second, Congress chose "to tie forfeiture directly to the commission of drug offenses," making the property forfeitable not because of its nature but because of its particular relation to the commission of a *criminal* offense. *Id.* at 2811. Third, in enacting these particular forfeiture provisions, Congress expressly intended them to supplement "the traditional criminal sanctions of fine and imprisonment," which it found "inadequate to deter or punish" drug traffickers. *Id.*, citing S.Rep.No. 225, 98th Cong., 2d Sess. 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3364.

The government argues that the analyses of *Halper* and *Austin* are radically distinct and that, for purposes of the Double Jeopardy Clause, as opposed to the Excessive Fines Clause, the questions of whether a forfeiture is punitive must be decided by a "case-by-case inquiry," as in *Halper*, rather than "categorical[ly]," as in *Austin*. Brief of the United States at 13-14. The government is wrong. The case-by-case analysis in *Halper* is not a substitute for, but an addition to, the categorical approach of *Austin*. The different emphases in *Halper* and *Austin* are attributable not to the different constitutional clauses involved, but to the different statutory schemes at issue. Specifically, the statutory penalty in *Halper* was not in itself punitive because it was expressly designed as remedial and compensatory. The issue therefore became whether such a statute, as applied to *Halper*'s particular facts, could exceed its remedial purposes and become punitive. The statutory penalty at issue in *Austin*, on the other hand, was inherently punitive -- it had no nongovernmental civil analogue and had been specifically intended by Congress to serve in large part as punishment. Moreover, forfeitures (unlike liquidated damages) are the closest to criminal punishments of all civil penalties, and have long been recognized as at least "quasi-criminal in character." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. at 700 (by a unanimous Court); *see also Boyd v. United States*, 116 U.S. at 634.[5]

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[3] *Austin* and *Halper* are clearly correct in holding constitutional limitations on punishment applicable to penalties that are not *entirely* remedial. The Double Jeopardy and Excessive Fines Clauses do not contain exceptions authorizing multiple or excessive punishments so long as those punishments are packaged together with civil or remedial monetary awards. If a governmental action serves as a punishment, even in part, the punitive component of that action must be imposed in accordance with constitutional standards.

[4] The Court's *dicta* on this issue have not been entirely consistent. The majority opinion in the Court's recent decision in *Bennis v. Michigan*, No. 94-8729, 1996 WL 88269 (March 4, 1996), emphasizes portions of the case law that highlight the remedial aspects of traditional forfeitures. The *Austin* opinion, however, authoritatively demonstrates that the Court has at least as often recognized that the "civil" quality of forfeitures is often largely fictional. 113 S.Ct. at 2808-10.

[5] In analyzing the double jeopardy claim in *89 Firearms*, 465 U.S. 354, a case on which the government otherwise heavily relies, the Court's unanimous opinion did not ask whether the particular forfeiture at issue

(continued...)

Taken together, then, *Halper* and *Austin* establish three basic principles: First, and most importantly, the "punishment" issue cannot be determined by labels. The denomination of a penalty as "civil" or "*in rem*" does not prevent that penalty from being a "punishment" which, under the Double Jeopardy Clause, can only be imposed once for the same offense. Second, a penalty is punishment if it cannot fairly be characterized as solely remedial in its application. Third, particular penalties enacted by Congress can be identified, on the basis of their characteristics and the legislative purpose behind their adoption, as intrinsically serving punitive purposes. These principles should dictate the determination of whether the forfeitures imposed on respondents here constituted punishment.

B. The Forfeitures In The Instant Cases Are Punitive

The government's attribution of remedial purposes to the forfeitures in question ignores the nature and legislative

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[5] (...continued)
imposed a financial burden that exceeded some putative "cost" to the government of the crime at issue. Rather, exactly as in *Austin*, it examined the particular forfeiture *statute* at issue and found it to be remedial (intended to "further the prophylactic purposes of the 1968 gun control legislation . . . . Keeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive"). 465 U.S. at 364. Unlike the forfeitures at issue in this case, the firearms forfeiture provisions have never been characterized as, and do not have the effect of, imposing heavy financial penalties on criminals. Similarly, in *Kurth Ranch* the Court did not assess whether Montana's marijuana tax, as applied to Kurth, was in excess of some appropriate "remedial" tax amount, but instead examined the attributes and purposes of the tax scheme to decide that the tax was intrinsically punitive. *89 Firearms* and *Kurth Ranch* are inconsistent with the government's effort to depict *Halper* as imposing a rigid case-by-case methodology from which *Austin* supposedly departed.

history of the particular forfeiture provisions at issue, constructing instead an entirely hypothetical set of nonpunitive purposes derived from other applications of completely different forfeiture statutes.

The purposes, scope, incidents and utilization of forfeiture have changed dramatically over time. *See generally* Leonard W. Levy, A LICENSE TO STEAL: FORFEITURE OF PROPERTY 1-81 (1996). Just as Congress may not escape limitations imposed by the Constitution by labeling proceedings "civil," so this Court should not misuse history by noting that *in rem* forfeiture was familiar to the framers, and then concluding that whatever Congress chooses to label an *in rem* forfeiture would have been recognized as such by James Madison. The forfeitures in the cases before the Court include *modern* innovations that cannot be passed off as traditional anomalies that, for historical reasons, may receive a free pass from constitutional scrutiny, for they differ "not only in degree, but in kind, from [their] historical antecedents." *United States v. James Daniel Good Real Property*, 114 S.Ct. at 515 (Thomas, J., concurring in part and dissenting in part). All forfeitures are not created equal, and the characterization of a forfeiture as punitive or remedial will depend on the nature of the particular forfeiture involved.

Many forfeitures have obviously remedial purposes. Forfeitures of contraband, for example, and forfeiture of many types of instrumentality of crime, will often have the remedial purpose of removing dangerous items from circulation. Narcotics, for example, may be seized, forfeited and destroyed by the government because it is illegal and dangerous for any unauthorized person to possess them. Smuggled goods are a special form of contraband in that they may not lawfully be possessed in this country until the customs duty is satisfied, regardless of the culpability of the person possessing the goods. Weapons, burglar tools, and

alcoholic beverages, and the component parts or substances used to make them, may be declared forfeit when they are used in the commission of a crime, not simply as a supplement to fines or imprisonment, but because such items are dangerous and therefore subject to remedial regulation of their possession and use. Moreover, the punitive component of such forfeitures is minimal, given the relatively low legitimate value of such items. The vast majority of this Court's cases dealing with forfeiture, and particularly the early cases relied upon to provide historical validation for the supposed remedial underpinnings of civil forfeitures generally, deal with forfeitures of this kind.

But neither of the forfeitures now before the Court stems from such traditional uses of forfeiture. The statute at issue in *Ursery* (No. 95-345), 21 U.S.C. §881(a)(7) -- the very statute found in *Austin* to have a punitive purpose -- was first enacted in 1984, as part of the Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, 98 Stat. 1837. While the government before this Court solemnly invokes the traditional purposes of *in rem* forfeiture of property, such as inducing owners of property to use care, abating a nuisance, and "insuring an indemnity to the injured party," Brief of the United States at 44-45, these supposedly remedial objectives are nowhere mentioned in the legislative history. The Senate Report accompanying the Act rarely distinguishes between civil and criminal forfeiture, referring repeatedly and indiscriminately to "forfeiture" as an additional sanction to "deter or punish" lucrative crimes for which "the traditional criminal sanctions of fine and imprisonment are inadequate." S.Rep.No. 225, *supra*, at 191. The particular provision extending civil narcotics forfeitures to real property used in furtherance of narcotics crimes, and the new amendments to the *criminal* forfeiture provisions of RICO to include forfeiture of the proceeds of RICO violations, are described as two aspects of an initiative to realize

"the full law enforcement potential of forfeiture" by increasing the extent of asset seizures, *id.* at 194-95. Moreover, the same 1984 legislation that added the real property subsection to the narcotics *civil* forfeiture statute expanded the *criminal* forfeiture provisions, formerly limited to continuing criminal enterprise cases, to cover all narcotics felonies, *see* Pub.L.No. 98-473, *supra*, §303, and also, like the newly enhanced civil forfeiture provision, to include forfeiture of real estate. *See, e.g.*, S.Rep.No. 225, *supra*, at 211. Thus, the very forfeiture provisions touted here by the government as remedial were designed by Congress as means of punishing and deterring criminal conduct.[6]

In light of this history, it simply defies reality for the government to claim that forfeitures of narcotics offenders' real property pursuant to such a statute are not at least partially punitive in nature.[7] Nor would a serious application of the government's proposed "case-by-case" analysis lead to a different result. This is not a case, like those cited by the government, in which the property constituted a public nuisance because the entire premises constituted an open and notorious drug market. *Cf. United States v. 141st Street*

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[6] Significantly, under the parallel criminal forfeiture provision enacted in tandem with §881(a)(7), respondent Ursery's property could have been forfeited criminally, as part of the same proceeding in which he was charged with criminal conduct, *see* 21 U.S.C. §853(a)(2). That the government chose, presumably for tactical reasons, to undertake two separate proceedings does not erase the clear punitive aspect of this forfeiture.

[7] Since *Ursery* and *Austin* involve the same statute, the observations of the *Austin* Court concerning the close link between the forfeiture and the commission of crime, and the availability of the innocent-owner defense, 113 S.Ct. at 2810-11, apply to this case as well. *See also Good*, 114 S.Ct. at 515 (Thomas, J., discussing the same statute).

Corp., 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), cited in Brief of the United States at 44 n.12. Any claim that Ursery's home constituted a public danger or nuisance, either intrinsically or under his ownership, is defeated by the fact that the government chose to allow Ursery to *retain* ownership of the home, settling the forfeiture case for a financial payment. *See* 59 F.3d at 570. The effect of the supposedly "remedial" action was thus neither more nor less than to impose a fine on Ursery for misusing his property.[8]

In *$405,089.23* (No. 95-346), the government sought forfeiture of "proceeds" and property "involved in" money laundering violations pursuant to 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(A). Like §881(a)(7), these statutes are hardly time-honored features of common-law jurisprudence. As even the government concedes, "[s]tatutes providing for forfeiture of proceeds of criminal activity do not share the historical pedigree of other *in rem* forfeitures." Brief of the United States at 14.

The first forfeiture provision explicitly permitting the forfeiture of the proceeds of narcotics transactions was the *criminal* forfeiture provision of 21 U.S.C. §848, adopted as §408 of Pub.L.No 91-513, 84 Stat. 1236, the Comprehensive Drug Abuse Prevention and Control Act of 1970. Section 511 of the same Act adopted a civil forfeiture regime for various categories of property, now essentially codified

[8] The government here did not seek to punish a drug dealer, and then seek to "remedy" the carelessness of a property owner who tolerated his activity, *see Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *see also Bennis v. Michigan*, 1996 WL 88269. This case -- like any case that will present double jeopardy problems due to parallel civil and criminal proceedings -- involves a two-fold punishment of the same actors for engaging in criminal conduct on or with their property.

in 21 U.S.C. §§881(a)(1) - (a)(5). But the proceeds provision of §881(a)(6) was not added until 1978, in "an important expansion of governmental power." *United States v. 92 Buena Vista Avenue*, 507 U.S. 111, 121 (1993). The Joint Explanatory Statement submitted to Congress with this bill expressly recognized "the penal nature of forfeiture statutes," 1978 U.S.C.C.A.N. 9518, 9522, and made no reference to the *post hoc* claim of the government and of some lower courts that forfeitures of proceeds are remedially intended to repay the government for the costs of prosecution. Brief of the United States at 44-46. Rather, the provision was passed by the Senate following a speech by its sponsor urging that:

> The criminal justice system can only be effective if there is a meaningful deterrent . . . The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by striking out against the profits from illicit drug trafficking . . . . Thus, the punitive and deterrent purposes of the Controlled Substances Act would have greater impact on drug trafficking.[9]

As noted above, in 1984 substantially identical criminal forfeiture provisions were added, giving the government the

[9] 124 Cong. Rec. 23055 (July 27, 1978)(remarks of Sen. Nunn). Similarly, the House was urged to accept this expansion of civil forfeiture on the ground that it would be "an extremely important weapon against the financial backers of illegal drug trafficking since it reaches them where it hurts the most. No longer will the big-money men of illegal drugs be able to hide their ill-gotten profits with impunity." 124 Cong. Rec. 36949 (Oct. 13, 1978)(remarks of Rep. Wolff). Since the forfeiture provision was added to another bill on the floor of the Senate, the quoted remarks constitute essentially the only explanations provided to the Congress of the purpose and import of the provision.

choice of proceeding in a single criminal action if it chose to do so. The legislative history does not suggest that Congress envisioned the new criminal forfeiture of proceeds as playing any different role than civil forfeitures -- the criminal alternative was simply seen as a "more efficient method of obtaining the forfeiture of assets of drug defendants" in certain circumstances. S.Rep.No. 225, *supra*, at 197.

The money laundering forfeiture provisions of 18 U.S.C. §981 were first enacted in 1986, as part of the same legislation that created the criminal money laundering provisions of 18 U.S.C. §§1956 and 1957, and the attendant criminal forfeiture provisions of 18 U.S.C. §982. Today, after extensive expansions and amendments, the civil and criminal forfeiture provisions relating to money laundering are substantially identical. As in *Ursery*, the government could have sought forfeiture of the same property it seeks here as part of a single proceeding, by invoking the criminal forfeiture provisions of §982, instead of bringing a separate civil action under §981. Like the narcotics civil forfeiture provisions, moreover, §981 focuses on the culpability of property owners by including an innocent owner defense. 18 U.S.C. §981(a)(2).[10]

The government nevertheless argues that stripping drug dealers of the proceeds of crime is not punitive, because it is designed to "prevent unjust enrichment," Brief of the United

[10] The history, nature, and purposes of the narcotics forfeiture provisions at issue here entirely distinguish *Bennis v. Michigan*, 1996 WL 88269. That case concerned a statute that was expressly constructed to deal with a traditional remedial goal of forfeiture: the abatement of public nuisances created by the use of property for purposes of keeping brothels. As Justice Thomas pointed out, the treatment of forfeitures as remedial should be "strictly" limited, "adhering to historical standards." *Id.* at *8 (Thomas, J., concurring).

States at 47-48, or because "proceeds forfeiture can never be out of proportion to the 'loss' suffered by the government or society." *Id.* at 49, quoting *Smith v. United States*, No. 95-2259, 1996 WL 72858, at *3 (7th Cir. Feb. 21, 1996). But this is sophistry. It may well be that a fine or forfeiture that is limited to the profit a criminal has made from crime cannot be constitutionally disproportionate or excessive, or even that such a fine or forfeiture is inadequate punishment to constitute an effective deterrent. But a weak or insufficient punishment is still *punishment*. Until the government's recent quest to rationalize its position on civil forfeitures, no one would ever have claimed that the generally inadequate fines that characterized federal criminal law until the 1980's did not constitute punishment because they often did not suffice to make crime financially unprofitable.

Forfeiture of criminal proceeds was brought into the law as part of RICO and the continuing criminal enterprise statutes precisely because existing financial sanctions were inadequate as punishment, which must at least remove the profits from crime regardless of whatever additional sanctions may then be imposed. *See Russello v. United States*, 464 U.S. 16, 25 (1983).

The government's attempt to recast punitive sanctions as a *Halper*-like "liquidated damages" provision, intended to "compensate" the government for the "social costs" of crime, is equally unavailing. Crimes like those of respondents surely impose a social cost. But it is the very essence of criminal punishment that it is directed not at the private compensation of individual victims for the harms they suffer through crime, but at retribution for the more generalized harm to the social order inflicted by criminals. In *Halper* the government sought, at least in part, compensation for specific harm to its proprietary interests. When the government seeks a "remedy" for the social damage inflicted by

drug dealers, it is engaged in the classically retributive and deterrent exercise of criminal punishment.

Once again, the government's proposed "case-by-case" methodology would yield the same results as a more categorical analysis. Where, as here, the forfeiture of proceeds is sought from the very person who is separately charged with the crime that generated them, the forfeiture results directly from the commission of the crime charged. Moreover, as the court of appeals recognized, the forfeitures in *$405,809.23* were not calibrated to strike only a "remedial" blow at traceable "proceeds" of specific crimes, but indiscriminately confiscated all of respondents' valuable assets under an amalgam of forfeiture statutes -- a clear signal that the forfeitures operated to punish respondents for their crimes. 33 F.3d at 1220 n.11.

No fair reading of the history of modern forfeiture statutes can portray the principal purpose of the statutes at issue here as anything but punitive. At the very least, the history shows that these statutes are not "solely remedial." Moreover, like the forfeitures found punitive in *Austin*, the forfeitures here are closely linked to (and indeed depend upon) the commission of crimes by respondents, and are based on statutes that focus on culpability by providing an innocent owner defense. The goal of these statutes is not to promote public safety by removing contraband or dangerous instrumentalities from circulation, or to abate nuisances. It is to take the profit out of crime, by stripping criminals of their ill-gotten gains. This is unquestionably a legitimate and desirable goal for Congress to pursue; but it is a *punitive* goal. As such, it should be subject to the limitations imposed by the Constitution on the power to punish.

II. THE DOUBLE JEOPARDY CLAUSE PROHIBITS THE GOVERNMENT FROM SEEKING IMPOSITION OF PUNISHMENT IN SEPARATE CIVIL FORFEITURE AND CRIMINAL PROCEEDINGS BASED ON THE SAME OFFENSE

A. This Court's Precedents And The Fifth Amendment Itself Establish That The Double Jeopardy Clause Prohibits Multiple Punitive Proceedings, Not Only Multiple Prosecutions

In *Abbate v. United States*, 359 U.S. 187, 198-99 (1959), this Court explained:

> The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts.

Respondents Ursery, Arlt and Wren suffered precisely the harms the Double Jeopardy Clause seeks to prevent: they were required to "run the gauntlet" more than once for the same offense, "thereby subjecting [them] to embarrassment, expense and ordeal and compelling [them] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [they] may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 190 (1957). They also confronted two different judges and two different triers of fact in the repeated attempts to punish them.[11]

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[11] Two different judges presided over the parallel civil and criminal proceedings below, *see Ursery*, 59 F.3d at 569-70; *$405,809.23*, 33 F.3d at

(continued...)

The Double Jeopardy Clause does not provide that an individual may not be "prosecuted" twice, as the government argues, Brief of the United States at 16-36, but that an individual shall not be "subject for the same offence to be put twice in jeopardy of life or limb." U.S. Const. amend. V. As argued in Point I, *supra*, *Halper* and *Kurth Ranch* establish that "jeopardy" refers to risk of any punitive governmental action, and not just "criminal" punishment within the meaning of the *Kennedy/Ward* test. *See* n.2, *supra*. As long ago as *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), this Court refused to read the apparently limiting "life or limb" language as restricting the scope of the Double Jeopardy Clause's prohibition of multiple punishments. So long as the Clause applies to modern punishments like incarceration and fines at all, its reach must extend to "civil" imposition of these sanctions, as *Halper* held.

This Court's interpretation is supported by the structure of the Bill of Rights. Had the framers of the Double Jeopardy Clause wished to limit the sweep of that provision, they could have positioned the Clause in the Sixth Amendment, which governs only "criminal prosecutions," rather than in the Fifth Amendment, whose protections are not all so limited.[12] Forfeiture proceedings may not command

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[11] (...continued)
1216. Had the forfeiture proceedings gone to trial (instead of being settled in *Ursery* and decided on summary judgment in *$405,809.23*), respondents would have confronted a second round of jury selection and decision. One central purpose of the Double Jeopardy Clause is to protect a defendant's Sixth Amendment right to jury trial by respecting the finality of jury verdicts and not allowing the government a second attempt to select a congenial trier of fact. *See* Peter Westen & Richard Drubel, "Toward a General Theory of Double Jeopardy," 1978 Sup.Ct. Rev. 81, 122-32.

[12] Each clause of the Fifth Amendment declares the extent of its own ap-
(continued...)

Sixth Amendment-based criminal procedures under the *Kennedy/Ward* test, but this Court has consistently applied constitutional guarantees outside the Sixth Amendment to these "quasi-criminal" proceedings. *See, e.g., One 1958 Plymouth Sedan*, 380 U.S. 693 (Fourth Amendment exclusionary rule); *Austin*, 113 S.Ct. at 2804 n.4 (Eighth Amendment Excessive Fines Clause); *Good*, 114 S.Ct. at 504 (Due Process Clause guarantees of notice and opportunity to be heard).

The *dicta* on which the government relies for the proposition that a "prosecution" is a prerequisite to double jeopardy protection, Brief of the United States at 17, not surprisingly, predate the decisions in *Halper*, *Austin* and *Kurth Ranch*. In these earlier decisions, the Court had assumed that the evils the Double Jeopardy Clause deplores could only take place if the government (1) brought successive criminal prosecutions, or (2) either exceeded the legislatively prescribed punishment or acted vindictively in a particular case. *See Halper*, 490 U.S. at 440. *Halper* can be described as supplementing this list in order to prevent prosecutors and legislatures from inflicting the harms the Double Jeopardy Clause has always prohibited through innovative use of "civil" proceedings. After *Halper*, it no longer makes sense to say that the Double Jeopardy Clause prevents the

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[12] (...continued)
plicability. The right to indictment by grand jury is, of course, limited by its own explicit terms to criminal cases; the Takings Clause and Due Process Clause just as clearly are not.

The privilege against self-incrimination includes apparently limiting language ("nor shall be compelled *in any criminal case* to be a witness against himself")(emphasis added). Nevertheless, because the damage the privilege aims to prevent may flow from a civil proceeding, this Court has held that the privilege may also be invoked during a civil proceeding, including a civil forfeiture proceeding, by a person seeking to avoid "incrimination." *See United States v. United States Coin & Currency*, 401 U.S. at 721-22; *Boyd*, 116 U.S. at 634.

discrete injuries of multiple prosecutions *or* multiple punishments. Multiple punitive proceedings are prohibited, even if they do not precisely fit one of the two prongs of the previous *dicta*.

History does not justify discarding the unanimous conclusions of *Halper* and *Austin*. Even if the framers of the Constitution had been willing to countenance some successive forfeiture and criminal proceedings concerning traditional subjects of common law forfeiture, the modern narcotics and money laundering forfeiture statutes at issue here bear little resemblance to common law forfeiture. *See* Point I, *supra*. Congress may indeed avoid the strictures of criminal procedure by creating civil forfeiture as a weapon, but if a prosecutor chooses to use this weapon in *addition* to criminal penalties, that prosecutor must respect not only the Eighth Amendment restriction on excessive punishment, but also the Fifth Amendment prohibition of multiple punitive proceedings.[13] The limitation is not directed at the legislature so much as at the prosecutor.

Whether Congress itself intended to authorize successive forfeiture and criminal proceedings is not relevant to double jeopardy analysis. Congress is certainly entitled to deference when it defines what constitutes an "offense," *see Missouri v. Hunter*, 459 U.S. 359 (1983), and may, by defining separate offenses, afford prosecutors the discretion to bring

[13] Just because forfeiture proceedings have historically been accompanied by unfair procedures is not a sufficient reason for the courts to refuse to measure those proceedings against our current constitutional definitions of fairness. In *Good*, Justice O'Connor agreed that the Court must use modern due process calculus in evaluating the constitutionality of the procedures of civil forfeiture "notwithstanding its historical pedigree." 114 S.Ct. at 513 (concurring in part and dissenting in part). *See also id.* at 515 (Thomas, J.)("it may be necessary -- in an appropriate case -- to reevaluate our generally deferential approach to legislative judgments in this area").

even successive criminal prosecutions. *See United States v. Dixon*, 509 U.S. __, 113 S.Ct. 2849 (1993). However, Congress may no more decide to allow prosecutors to bring multiple punitive proceedings for what it has already defined as the "same offense," *see United States v. 9844 South Titan Court*, 75 F.3d 1470, 1490-91 (10th Cir. 1996); Elizabeth Lear, "Contemplating the Successive Prosecution Phenomenon in the Federal System," 85 J.Crim.L. & Criminology 625, 628 n.18 (1995), than it may unilaterally declare that its actions are not "punitive."[14]

Like its approach to the question of what constitutes punishment, the government proposes that the Court also limit itself here to a narrow case-by-case approach restricted to asking whether government actors in these particular cases were "vindictive" in pursuing multiple punitive proceedings. Brief of the United States at 27. But vindictiveness is not the only, or even the principal danger posed when the government has a quiver full of methods of seeking punishment. Regardless of the purity of their motives, if government attorneys are permitted to seek otherwise allowable penalties independently and sequentially, they may thereby exhaust a property owner's resources and will, and consequently increase the risk of punishing the innocent.

This potential for abuse is inherent in all instances where the government seeks forfeiture and criminal penalties

[14] The Court has recognized in many other areas that, while deference to the legislature plays an important role in some aspects of constitutional interpretation, under fundamental principles of judicial review, the legislature cannot be given the final power to decide when constitutional guarantees apply. In the procedural due process area, for example, legislatures may decide whether or not to create entitlements to liberty or property, but the courts must then decide what process is due to protect whatever entitlements the legislature creates. The legislature may not choose what procedures will apply. *See, e.g., Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985).

in parallel proceedings. *See* David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES at 10.01 (1994); Mary M. Cheh, "Constitutional Limitations on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," 42 Hastings L.J. 1325, 1389-98 (1991). The government has vast power to use sequencing of the two proceedings in whatever way will most disadvantage the defendant/claimant, who does not even have the benefit of a constitutional right to counsel in connection with the forfeiture proceeding. *See* Smith, *supra*, at 11.0. In forfeiture proceedings under §881 and other statutes, the government may conduct discovery against the defendant/claimant, who may assert the privilege against self-incrimination only to find that he has lost his property as the price of defending his liberty. *See* Cheh, *supra*, at 1384-89. The government may litigate the forfeiture action first if it wishes to strip a prospective defendant of assets to hire criminal defense counsel, *see Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989), or may stay the forfeiture action if it prefers to avoid having to respond to the claimant's reciprocal discovery requests, *see* 21 U.S.C. §881(1). If the defendant is convicted in the criminal action, the government may move for summary judgment, as it did in *$405,089.23*; if the defendant is acquitted, the government may proceed with the forfeiture action nevertheless, under cover of the different burdens of proof involved. *89 Firearms*, 465 U.S. at 366. Because two different prosecutors, often from different offices, represent the government in the parallel proceedings, *see Ursery*, 59 F.3d at 575, claimant/defendants are unlikely to be able to "once and for all . . . conclude their confrontation with society," *United States v. Jorn*, 400 U.S. 470, 486 (1971), at the time of the jury's verdict. Like respondents Arlt and Wren, they may find themselves defending their property for a full year or more after resolution of their criminal case, *see* 33 F.3d at 1214. Respondents Ursery,

Arlt and Wren did not even have the benefit of having the same judge presiding over the interplay of the parallel proceedings to ensure that the government did not abuse its unilateral powers, *see Ursery*, 59 F.3d at 569-70; *$405,809.23*, 33 F.3d at 1216. Successive proceedings also increase the danger that, although innocent, a defendant might be punished nevertheless, because the government has the opportunity to rehearse its case and to use what it learns from the defense in the first proceeding to win the second.

Virtually every federal court of appeals to have examined the question has agreed with the Sixth and Ninth Circuits that permitting the government to separately pursue criminal penalties and civil forfeiture penalties amounting to "punishment" violates the Double Jeopardy Clause. *See United States v. 9844 South Titan Court*, 75 F.3d at 1482-86 (10th Cir.); *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.), *cert. denied*, 115 S.Ct. 669 (1994); *United States v. Tilley*, 18 F.3d 295, 297 (5th Cir.), *cert. denied*, 115 S.Ct. 574 (1994); *United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493 (11th Cir. 1994); *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 922 (1994). Because the gravamen of the violation is that the government gives itself two bites of the apple, the relative timing of the two proceedings cannot determine whether there has been a double jeopardy violation.[15] Therefore, because the forfeiture proceedings in these cases were punitive, the government was not permitted to pursue multiple proceedings if both proceedings involved the "same offense."

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[15] *See Kurth Ranch*, 114 S.Ct. at 1958 (Scalia, J. dissenting); *Brown v. Ohio*, 432 U.S. 161, 168 (1977). When jeopardy attached in each proceeding only matters with respect to deciding which of the two parallel proceedings must be vacated, but not to whether one or the other must be.

B. The Civil Forfeiture Actions And The Criminal Prosecutions In These Cases Are Proceedings Punishing The "Same Offense"

In both cases below, the government sought a punitive forfeiture of property belonging to criminal defendants in a parallel civil proceeding based on all or substantially all of the same conduct prosecuted in the respective criminal cases. Because forfeitures are not usually classified as "offenses," *see Libretti v. United States*, __ U.S. __, 116 S.Ct. 356 (1996), in that they define forms of punishment rather than criminal conduct, the Tenth Circuit has suggested that Double Jeopardy analysis should take a different form in parallel proceeding cases. *9844 South Titan Court*, 75 F.3d at 1488-89. The classic *Blockburger* test measuring when two "offenses" are covered by the Double Jeopardy Clause -- "whether each provision requires proof of a fact which the other does not," *Dixon*, 113 S.Ct. at 2856, quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932) -- can nevertheless be applied here. Once again, labels like "offense" are less significant than the purposes of the constitutional guarantee at issue.

As demonstrated in *Dixon*, the *Blockburger* test requires an abstract comparison of the elements of the distinct offenses. In *Dixon*, the Court also confirmed that, as in *Harris v. Oklahoma*, 433 U.S. 682 (1977)(*per curiam*), a sanction imposed for violating one crime through the commission of an incorporated offense can be barred by double jeopardy "even without specifying the latter's elements." *Grady v. Corbin*, 495 U.S. 508, 528 (1990)(Scalia, J., dissenting); *Dixon*, 113 S.Ct. at 2857. The Court in *Harris* examined a felony-murder statute that did not necessarily include the particular separately charged predicate felony because its language permitted any number of felonies to qualify as the predicate offense. In *Dixon*, the criminal contempt statute the Court reviewed essentially incorporated the entire penal code.

The forfeiture statutes at issue here speak in terms of "violations of this subchapter," 21 U.S.C. §§881(a)(6) and (7), or "involved in violations" of specific provisions of title 18, 18 U.S.C. §981(a)(1)(A). As in *Harris* and *Dixon*, these forfeiture statutes subsume the underlying criminal charges so that forfeiture cannot be ordered without proof of the underlying criminal offense. None of the federal courts of appeals to have considered the question disagrees with the Sixth and Ninth Circuits on this point either. *See, e.g., 9844 South Titan Court*, 75 F.3d at 1489-90 (10th Cir.); *Tilley*, 18 F.3d at 297-98 (5th Cir.); *One Single Family Residence*, 13 F.3d at 1495 (11th Cir.).[16]

Some forfeitures will survive the *Blockburger* test -- if the forfeiture complaint alleges different crimes than those for which defendant was prosecuted, if an owner has allegedly intended to use property in connection with an offense but has not yet committed or attempted that offense, or if the owner is simply not being prosecuted and therefore has no double jeopardy problem. In both of the cases before the Court, however, the criminal defendant and the claimant were identical, all or at least some of the indicted crimes served as the predicate offenses for the forfeiture, and the only additional element required to be proven related to the role of the property in the offense.

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[16] The government's mode of proceeding in parallel forfeiture/criminal cases highlights the interlocking relationship of proceedings based on the same underlying substantive offenses. Following the conviction of respondents Arlt and Wren, the government moved for summary judgment in its forfeiture action. 33 F.3d at 1214. In some cases, the government incorporates the actual criminal indictment by reference in the civil forfeiture complaint. *See, e.g., Millan*, 2 F.3d at 18.

C. Criminal Punishment And The Punitive Forfeitures Sought In These Cases May Both Be Imposed Only During The Same Proceeding, With The Same Judge Presiding And The Same Trier Of Fact

The Sixth Circuit was clearly correct in ruling that the government's failure to seek the available punishments in a "single coordinated proceeding" led to a double jeopardy violation.[17] The Ninth Circuit was also correct in observing that the government could have avoided this problem by seeking criminal forfeiture under the criminal indictment. 33 F.3d at 1216-17. While *amicus* believes that it would be preferable for the government to have utilized criminal forfeiture in these cases, this Court need not decide in the context of this case whether to agree with the Ninth Circuit that the government is *always* required to choose between civil forfeiture and criminal prosecution.

It may indeed be possible for a civil forfeiture proceeding and a criminal prosecution to be joined in the same proceeding, as the Sixth Circuit believed, 59 F.3d at 575, *see, e.g., United States v. Certain Real Property*, 972 F.2d 136 (6th Cir. 1992); *United States v. Real Property*, 816 F.Supp. 1077, 1085 (E.D.Va. 1993), as long as the two proceedings are assigned to the same judge and provide the defendant

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[17] The notion of the Second and Eleventh Circuits that double jeopardy problems can be avoided if, although separate, the civil and criminal proceedings are "coordinated," *see Millan*, 2 F.3d at 20; *One Single Family Residence*, 13 F.3d at 1499, flies in the face of language and logic. The proceedings are still separate, with separate judges, fact-finders, and opportunities to undermine the defense. As the Tenth Circuit has recognized, *9844 South Titan Court*, 75 F.3d at 1487-88, coordinating these separate proceedings may only increase the pressure on some of the values the Double Jeopardy Clause protects by allowing one government attorney to take full advantage of the accumulated knowledge and procedural finesse of the other.

the possibility of having both issues tried before the same trier of fact (presumably in a bifurcated verdict procedure like that used in criminal forfeitures, *see* Smith, *supra*, at 11-14, 14-35 - 38.2). The principal question would then be whether the government must relinquish the advantage of whatever lower burden of proof is permissible in civil proceedings when it decides to prosecute the same conduct.

In a joint proceeding, moreover, the Due Process Clause might limit the government's use of some of the favorable procedures (such as discovery) attached to civil forfeiture. But, the Court can and should allow Congress to decide whether it wishes to provide for such joint proceedings and how to structure them before addressing constitutional questions not raised by these cases.

Finally, the state *amici* argue that application of double jeopardy principles to the states would be burdensome. *See* Brief *Amicus Curiae* of the State of Connecticut, *et al.* But state legislatures would continue to have the same generous options that Congress has: they may use criminal instead of civil forfeiture when they intend to punish; they may provide for combined civil forfeiture/criminal proceedings; or they may craft forfeiture statutes limited to remedial goals (which could then be brought separately). The only thing that they may not do is to punish what they themselves have defined as the same offense, serving what they themselves have structured as punitive goals, in two separate proceedings. The Double Jeopardy Clause demands no less.

CONCLUSION

For the reasons stated above, the judgments below should be affirmed.

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